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MAR 25 1968
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

October Term, 1967

No. 1259

The Denver & Rio Grande Western Railroad Company,
Petitioner,
vs.
United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered August 8, 1967 (Petition for Rehearing denied December 26, 1967), reversing the judgment of the United States District Court for the District of Utah.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in 385 F.2d 161 (10th Cir. 1967). A copy of the opinion is attached hereto as

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Appendix A. Relevant unreported Memorandum Decisions were rendered by the United States District Court for the District of Utah in this case and in a companion case, *United States of America* v. *Western Pacific Railroad Company*, No. C 221-65, in the United States District Court for the District of Utah. Copies of the District Court decisions are attached hereto as Appendix B-1 and Appendix B-2.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit of which review is sought was entered on August 8, 1967. A Petition for Rehearing was timely filed, and was denied on December 26, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and the applicable Rules of this Court.

QUESTION PRESENTED

Whether Ex Parte No. 73 (49 C.F.R. §§ 142 et seq.), a regulation of general applicability adopted by the Interstate Commerce Commission, is an "order" of the Interstate Commerce Commission within the meaning of Section 16(8) of the Interstate Commerce Act (49 U.S.C. § 16(8)).

STATUTES AND REGULATIONS INVOLVED

The statutory provisions here involved are Sections 3(2), 10(1), and 16 of the Interstate Commerce Act (49 U.S.C. §§ 3(2), 10(1), and 16), Section 10 of the Elkins Act (49 U.S.C. § 41 (1), and Sections 551(4) and 551(6) of the Administrative Procedure Act (5 U.S.C. §§ 551(4) and

551(6). These provisions are set out verbatim in Appendix C hereto.

The regulations here involved are the "credit regulations" adopted by the Interstate Commerce Commission in Ex Parte No. 73. These regulations, including the published administrative history with respect thereto, are set out verbatim in Appendix D hereto.

STATEMENT

Proceedings Below

This is a civil forfeiture suit initiated by the Bureau of Enforcement (hereinafter called the "Bureau"), a semi-autonomous investigating and prosecuting sub-agency of the Interstate Commerce Commission (hereinafter called the "Commission"), claiming forfeitures under Section 16(8) of the Interstate Commerce Act (49 U.S.C. § 16(8)) for alleged violations by Petitioner of credit regulations adopted by the Commission and known as Ex Parte No. 73.

Petitioner moved to dismiss respondent's complaint upon the ground that no claim upon which relief could be granted was stated therein. The District Court granted petitioner's Motion to Dismiss, stating his reasons therefor in his Memorandum Decision in a companion case:

> "I am of the opinion that Ex Parte No. 73 is not such an order as is contemplated by Section 16 of Title 49 United States Code, and that the alleged conduct of the defendant does not constitute a knowing failure to obey any order of the Interstate Commerce Commission. Ex Parte No. 73 is not the type of "order" contemplated by 49 United States Code Section 16(8). Ex

> Parte No. 73 is legislative in character and has the same force and effect as it would have if enacted by Congress. It is in effect a general modification of Section 3 of Title 49 which prohibits the surrender of freight without first collecting the freight charges." (Appendix B-2, p. 2.)

The District Court observed that, to him, "there would be serious problems of due process were I to hold here that without an administrative order directed specifically to the complained conduct and an opportunity to be heard thereon, the defendant in this proceeding would be liable for the forfeiture in question." (Appendix B-1, p. 1.)

After dismissal of its complaint in the District Court, respondent appealed the Judgment of dismissal to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals found no distinction between orders of the Commission adjudicatory in character and rules or regulations of general applicability, legislative in character, notwithstanding that the Administrative Procedure Act, in Sections 551(4) and 551(6) (5 U.S.C. §§ 551(4) and 551(6)), clearly defines this very distinction. The Court of Appeals concluded that "under the procedure adopted by Congress, there is a judicial forfeiture for disobedience of 'any order' made under § 3(2) without regard to whether that order is legislative or adjudicatory." (Appendix A, p. 4.)

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals has decided an important question of federal law erroneously. This question is one of substantial public importance that should be settled by this Court.

The questions raised by the decision and opinion of the Court of Appeals are of the utmost public interest and importance. As the Court of Appeals correctly notes, the case as presented to it was one of first impression, there being no reported decision involving the claims asserted by respondent in this proceeding. (Appendix A, p. 3.) The claims asserted by respondent are novel. Although Ex Parte No 73 has been in effect since 1920, and Section 16(8) of the Interstate Commerce Act has been in effect since before 1920, not until 1964 did the Bureau assert any claim that Ex Parte No. 73 was an order within the meaning of Section 16(8), and that a supposed violation of the regulatory provisions of Ex Parte No. 73 could provide the foundation for the severe forfeiture claims under Section 16(8).

There is presently pending in the United States District Court for the District of New Jersey a civil suit against the Staten Island Rapid Transit, Civil No. 1042-65. The Bureau has advised the Baltimore and Ohio Railroad Company of numerous claimed similar violations and there is a threat of litigation arising out of such claims. (See Brief of Amicus Curiae, the Baltimore and Ohio Railroad Company, in support of Petition for Rehearing in the Court of Appeals.) There is pending in the United States District Court for the Eastern District of Pennsylvania a civil suit against the Pennsylvania Railroad Company, Civil No. 39697, also involving these same issues.

Prior to mid-1964, neither the Bureau nor the Commission asserted any claim resembling that set forth in the complaint in this action. In November, 1964, the first such action was initiated against the Richmond, Fredricksburg and Potomac Railroad Company in the United States

District Court for the Eastern District of Virginia, Civil No. 3494. Other actions were filed subsequently, including the present action against Petitioner and the companion case against the Western Pacific Railroad Company. These efforts to seek harsh forfeiture penalties under Section 16(8) of the Interstate Commerce Act are made in the face of 44 years of uniform administration of the Interstate Commerce Act and the Credit Regulations of the Commission adopted pursuant thereto. Prior to the novel efforts of the Bureau to bring these issues within the harsher penalties of Section 16(8) of the Act, all actions involving claimed violations of the credit regulations were brought under the criminal provisions of the Interstate Commerce Act and the Elkins Act (49 U.S.C. §§ 10(1) and 41(1)). This Court should issue its writ of certiorari to review the judgment of the Court of Appeals in this case for the following reasons:

1. The decision of the Court of Appeals erroneously determines that Ex Parte No. 73 is an order within the meaning of Section 16(8) of the Interstate Commerce Act.

2. The decision of the Court of Appeals disregards in their entirety the controlling provisions of the Administrative Procedure Act distinguishing plainly between an order and a regulation or rule.

3. The decision of the Court of Appeals creates a substantal conflict between the application of the criminal sanctions of the Interstate Commerce Act and the Elkins Act, contained in 49 U.S.C. Sections 10(1) and 41(1), and the provisions of Section 16(8) of the Interstate Commerce Act, and permits the Bureau to seek inconsistent sanctions for the same claimed unlawful conduct.

Discussion of these points follows:

1. THE DECISION OF THE COURT OF APPEALS ERRONEOUSLY DETERMINES THAT EX PARTE NO. 73 IS AN ORDER WITHIN THE MEANING OF SECTION 16(8) OF THE INTERSTATE COMMERCE ACT.

Section 3(2) of the Act prohibits delivery of freght without payment of charges "except under such *rules and regulations* as the commission may from time to time prescribe. . . ." (Emphasis added.) Ex Parte No. 73 is such a *rule or regulation.* By its terms, Ex Parte No. 73 adopts "the following rules and regulations. . . ." Ex Parte No. 73 is not an order in any sense of the word. More particularly, it is not an order within Section 16 of the Act. It is a set of rules and regulations of general applicability, as contemplated by Section 3(2) of the Act pursuant to which it was adopted by the Commission. If the conduct complained of in this action violates anything, it violates Section 3(2) of the Act, since the conduct allegedly involves an extension of credit by petitioner in excess of that permitted by Ex Parte No. 73. It is Section 3(2) that prohibits the extension of credit, not Ex Parte No. 73. Section 3(2) prohibits the extension of credit "except under such rules and regulations as the commission may from time to time prescribe. . . ." Ex Parte No. 73 constitutes the rules and regulations of the Commission permitting the limited extension of credit. Section 16(8) does not afford a remedy for violation of Section 3(2) of the Act. That remedy is found only in the criminal sanctions of the Act including Section 10(1) of the Act and Section 10 of the Elkins Act.

The Court of Appeals, in holding that Ex Parte No. 73 is an order within the meaning of Section 16(8), relies upon "the plain language of the statute." (Appendix A, page 4.) The Court of Appeals then goes on to hold that there is absolutely no distinction between orders "legislative" in character and orders "adjudicatory" in nature. This holding violates the plain and obvious meaning not only of the statute but also of Ex Parte No. 73 itself. As has been noted, Ex Parte No. 73 adopts "the following rules and regulations. . . ." This is the Commission's own characterization of the contents of Ex Parte No. 73. As has also been noted, Section 3(2) of the Act does not contemplate the adoption of *orders*, but contemplates the adoption of *rules and regulations*. Rules and regulations are what the Commission adopted in Ex Parte No. 73.

Section 16(8) of the Interstate Commerce Act (hereinafter called the "Act") is applicable only to "Any carrier . . . who knowingly fails or neglects to obey any order made under the provisions of Sections 3, 13 or 15 of this title. . . ." (49 U.S.C. § 16(8).) The Bureau contends that Ex Parte No. 73 is an "order made under the provisions of" Section 3 of the Act. Section 16 of the Act, however, read in its entirety, is clear as to what constitutes an "order" within its terms. Section 16(1) provides as follows:

> "If, after hearing on a complaint made as provided in Section 13 of this title, the commission shall determine that any party complainant is entitled an an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 16(2) authorizes suit to enforce such an order in the District Courts of the United States and in state courts. Section 16(3) imposes limitation periods upon the commencement of actions both before the Commission and in the courts to enforce orders of the Commission. (See particularly Section 16(3)(f) providing that "A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.") Section 16(4) provides for joinder of parties, service of process, and judgment in suits to enforce such orders. Section 16(5) provides for service upon the parties of orders of the Commission and notices of proceedings. Section 16(6) provides for suspension or modification by the Commission of such orders. Section 16(7) imposes upon carriers the duty to observe and comply with such orders. Section 16(8), the section upon which the Bureau here relies, imposes severe penalties for the failure or refusal to obey such orders of the Commission as are made under certain sections of the Act. Sections 16(9) through 16(13) contain other provisions relative to orders issued by the Commission after proceedings in compliance with Section 16(1).

It is true that Section 16(1) refers only to complaints made as provided under Section 13 of the Act, while Section 16(8) refers to orders made under Sections 3, 13 or 15 of the Act. Petitioner contends that the plain meaning of Section 16, read in its entirety, is that the only conduct punishable under the harsh provisions of Section 16(8) is violation of an order meeting the procedural requirements of the other provisions of Section 16. Even if Section 16 is broader in its scope than Section 16(1), it is nevertheless

clear that Congress contemplated compliance with rather strict procedural safeguards in the entry of orders, the violation of which would be cognizable under Section 16(8).

Section 16(8), in reality, provides a penalty for punishments of contempt of the Commission, committed by violation of a direct and mandatory order. No violation of such an order is claimed here.

Ex Parte No. 73 is not an order within the meaning of Section 16 of the Act, or any subdivision thereof. No proceedings were had before the Commission as required by Sections 16(1) and 16(5). Ex Parte No. 73 does not order, direct, command or enjoin petitioner, or anyone, to do or refrain from doing anything. Ex Parte No. 73 is a permit to railrads authorizing them to surrender freight without prepayment of charges and to extend limited credit to shippers under the particular circumstances set forth in the regulations.

It is clear that Ex Parte No. 73 is not and cannot be an order of the Commission within the meaning of Section 16, and subdivision 8 thereof, of the Act.

2. THE DECISION OF THE COURT OF APPEALS DISREGARDS IN THEIR ENTIRETY THE CONTROLLING PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT DISTINGUISHING PLAINLY BETWEEN AN ORDER AND A REGULATION OR RULE.

It is clear that Ex Parte No. 73 is a "rule" within the meaning of Section 551(4) of the Administrative Procedure Act and not an order within the meaning of Section

551(6) of that Act. Section 551(4) defines a rule as "the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy . . . and includes the approval or prescription for the future of rates, wages, . . . services or allowances therefor . . ., or practices bearing on any of the foregoing." Section 551(6) of the Administrative Procedure Act defines an order as "the whole or any part of the final disposition . . . of an agency in a matter other than rule making. . . ." Ex Parte No. 73 is itself designated by the Commission as rules and regulations. It is filed in the office in which the Administrative Procedure Act requires that regulations be filed. Upon its adoption by the Commission as a part of the rule making processing, and by reason of the provisions of Section 3(2) of the Act, Ex Parte No. 73 became part and parcel of Section 3(2) of the Act. As such, it cannot be construed as an order.

As has been noted hereinabove, there was no compliance in connection with the adoption of Ex Parte No. 73 with the adjudicatory requirements of the Act. There was a careful general study that supported the regulation adopted. There certainly was no adjudicatory proceeding as contemplated by the Administrative Procedure Act. (See 5 U.S.C. §§ 551(7), 553, and 554.)

There is no evidence in the record that petitioner was a party to, had notice of, or had an opportunity to be heard in connection with any of the proceedings relative to Ex Parte No. 73. Petitioner does not, of course, claim ignorance of the provisions of Ex Parte No. 73. The critical fact is that Ex Parte No. 73 cannot under any circumstances

be construed as an order directed to petitioner. Accordingly, if petitioner has violated Ex Parte No. 73, it has not violated an order of the Commission directed to petitioner as contemplated by Section 16(8) of the Act.

It is clear that Ex Parte No. 73 is a regulation and not an order as those terms are plainly defined by the controlling provisions of the Administrative Procedure Act.

3. THE DECISION OF THE COURT OF APPEALS CREATES A SUBSTANTIAL CONFLICT BETWEEN THE APPLICATION OF THE CRIMINAL SANCTIONS OF THE INTERSTATE COMMERCE ACT AND THE ELKINS ACT, CONTAINED IN 49 U.S.C. SECTIONS 10(1) AND 41(1), AND THE PROVISIONS OF SECTION 16(8) OF THE INTERSTATE COMMERCE ACT, AND PERMITS THE BUREAU TO SEEK INCONSISTENT SANCTIONS FOR THE SAME CLAIMED UNLAWFUL CONDUCT.

As has been noted hereinabove, the Bureau and the Commission have for many years enforced Sections 3(2) of the Act and the related credit regulations of the Commission by proper actions at law under Section 10(1) of the Act and Section 10 of the Elkins Act. (49 U.S.C. §§ 10(1) and 41(1).) Section 10(1) of the Act provides for a fine of not to exceed $5,000.00 for each violation of certain provisions of the Act, including Section 3(2). Section 10 of the Elkins Act provides for a fine of not less than $1,000.00 nor more than $20,000.00 for certain willful violations of the Act. There is no doubt but that violations of Section 3(2), as modified and implemented by Ex Parte No. 73, are cognizable under Section 10(1) of the Act and Section 10 of the Elkins Act.

Section 16(8) of the Act, however, imposes a civil forfeiture, as distinguished from a criminal penalty, of $5,000.00 for each offense, with each day of a continuing violation being deemed a separate offense. It is inconceivable that Congress could have intended the civil forfeiture provisions of Section 16(8) and the criminal penalties of Section 10(1) and Section 10 of the Elkins Act to apply to precisely the same conduct. This inconsistency is avoided if Section 16(8) is properly construed, in its context, as applicable to orders of the Commission directed to parties after notice and an opportunity to be held have been afforded to such parties. Only such orders are orders under the proper definitions contained in the Administratve Procedure Act and under Secton 16 of the Interstate Commerce Act. To sustain the position of the Bureau in this action, as the Court of Appeals has done, is to permit the Bureau to elect between remedies that vary widely as to their nature, magnitude and purpose. The act should not be so read or applied.

The extremely tenuous position of the Bureau in asserting a remedy under Section 16(8) of the Act for purported violations of Ex Parte No. 73 is demonstrated by the Bureau's recent initiation of at least two proceedings under Secton 10(1) of the Act for violation of the credit regulations. The Court's attention is respectfully directed to *United States* v. *The Redding Company,* Criminal No. 324-65, now pending in the United States District Court for the District of New Jersey, and *United States* v. *Missouri-Kansas-Texas Railway Company,* Criminal No. 65-H-252, now pending in the United States District Court for the Southern District of Texas. In these criminal proceedings, of course, the Bureau will be obligated to establish the de-

fendants' guilt beyond a reasonable doubt and, if successful, will obtain only the penalties prescrbed by Secton 10(1) of the Act. The decision of the Court of Appeals in this case, however, would permit the Bureau, wholly in its discretion and without regard to any factual, legal or other distinctions, to seek much more harsh forfeiture penalties under Section 16(8) of the Act; and since these proceedings are civil rather than criminal in nature, the Bureau would be obligated to prove its case only by preponderance of the evidence. Again, Congress could not have intended such a result in its adoption of the Act.

CONCLUSION

If the Bureau should be successful in proving the facts alleged in its Complaint, it will not have established any violation of Ex Parte No. 73. A simple, straightforward reading of Ex Parte No. 73 will demonstrate to any reasonable mind that *it is not capable of being violated.* It is permissive, not directory. The prohibition is contained in Section 3(2) of the Act. Ex Parte No. 73 represents the rules and regulations expressly provided for in Section 3(2) of the Act, and defines the circumstances under which carriers are *permitted* to extend credit to shippers. Ex Parte No. 73 is a general regulation applicable to all railway carriers. It was adopted after a general study of the industry. It is not directed to this petitioner or to any particular carrier. It does not represent the result of a proceeding to which this petitioner was a party. It is not an order directed to this petitioner, or to anyone in particular.

Congress and the courts have devoted many years and much effort to the development of a meaningful body of

administrative law. One of the most important and fundamental results of this effort has been the clear distinction that has emerged in the cases, and that was written into the Administrative Procedure Act, between orders and regulations. The decision of the Court of Appeals disregards the distinction and, indeed, the entire structure of law upon which it is based. The Court of Appeals holds there is no such distinction. If ever there was a regulation of general application, clearly different from an order, it is Ex Parte No. 73. If ever the distinction between regulations and orders was important and sensible, as it is, it is important and sensible in this case, where the Bureau seeks to impose harsher penalties in a civil proceeding than are available to it in criminal proceedings that are expressly authorized by the Act, and that it has utilized as a means for enforcing Section 3(2) of the Act for many years.

The trial court correctly held that Ex Parte No. 73 is not an order within the meaning of Section 16, and subdivision 8 thereof, of the Act. The decision of the Court of Appeals reversing the trial court's judgment was clearly erroneous and raises questions of the highest public importance. This Court should issue its writ of certiorari to review and reverse the decision of the Court of Appeals.

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Dated: March 21, 1968.

(Appendices A, B-1, B-2, C and D Follow)